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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 17

ALEXANDER BOYD,
Appellant,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent

BRIEF OF RESPONDENT AND APPELLEE

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BRIEF OF RESPONDENT AND APPELLEE

I.

OPINION BELOW

Grand Trunk Western R. Co. v. Boyd, 321 Mich. 693, 33 N. W. (2d) 120 (R. 52).

II.

JURISDICTION

Respondent agrees that the Court has jurisdiction.

III.

QUESTIONS PRESENTED

Statement of question involved.

Were the contracts entered into between the Appellant and Respondent void under the provision of the Federal Employers' Liability Act, 45 U. S. C. A., Sections 55 and 56?

IV.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the case with the exception that the following should be added:

In the Order of the Supreme Court of Michigan, dated October 21, 1948, staying all proceedings pending determination by the Court of Petitioner's application for Writ of Certiorari, it was provided that the Injunction theretofore issued by it on December 2, 1947 (R. 9) "shall remain in full force and effect" (R. 97). Six days thereafter, on October 27, 1948, Petitioner, in compliance with his contracts (R. 19, 20, 21) and the Orders of the Supreme Court of Michigan (R. 9, 97) filed suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, for damage for the identically same alleged cause of action that was involved in the proceedings before the Supreme Court of Michigan. (Appendix 13 Respondent's Brief in opposition to granting Writ of Certiorari.)

The accident complained of happened on November 23, 1946 (R. 14) and the Statute of Limitations (45 U. S. C. A. 56, Sec. 6, 36 Stat. 291) did not bar commencement of an action in any permitted jurisdiction for nearly a year thereafter, and the filing of the suit in Michigan was

wholly voluntary and without compulsion or necessity of any kind other than the fulfillment of Petitioner's contractual obligations.

V.

SUMMARY OF THE ARGUMENT

A.

Venue may be waived under the provisions of the Federal Employers' Liability Act. Section 6 of the Act (45 U. S. C., Sec. 56) provides that actions may be brought in the district of the residence of the defendant or in which the cause of action arose, or in which the defendant shall be doing business at the time of such action. Under the provisions of the Judicial Code it has been generally held without exception that venue is a privilege and may be waived by act or even by failure to act. The same rules should apply to venue under the Federal Employers' Liability Act as under the Judicial Code, and this Court has held that venue may be waived under the provisions of the Clayton Act where the provisions appear to be mandatory and not optional as under the Federal Employers' Liability Act.

B.

Since the amendment to the Judicial Code (28 U. S. C.) (1948) (1404 A.) affecting the doctrine of *forum non conveniens* which allows a Federal Court to transfer plaintiff's cause of action to another forum on the grounds of convenience it must follow that venue is a privilege and not a vested right. If a lower court on its own order can transfer a cause of action merely on the grounds of convenience, it must follow that an interested party could exercise the same privilege or right by written contract or otherwise.

C.

The contracts entered into are not void under the provisions of the Federal Employers' Liability Act. Section 5 of the Act (45 U. S. C., Section 55) condemns contracts and devices tending to exempt the railroad from any liability created by the Act. The only liability created by the Act is the liability for damages for injuries or death set forth in Section One thereof. Section 6 of the Act confers upon the employee the privilege of selecting the venue in which to enforce that liability. It does not create a new or additional liability. The liability of the railroad is the same wherever enforced. The choice of a venue within which to determine that liability cannot be deemed an exemption from such liability. It is a choice that at some time the plaintiff is bound to make in order to enforce his rights. Hence, the contract providing that any trial that is to be held in the State or Federal Court sitting within the State where the accident occured and where the plaintiff resided is not condemned by the letter or spirit of the act.

D.

The majority view is that the Michigan Court was not in error in refusing to follow the decision of the United States Court of Appeals, Sixth Circuit.

E.

The filing of the suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, was in accordance with appellant's contractual obligations and orders of the Supreme Court of Michigan, and is tantamount to an abandonment by Petitioner of his suit in Illinois.

ARGUMENT

A.

A-1. THE CONTRACT DOES NOT VIOLATE THE FEDERAL EMPLOYERS' LIABILITY ACT AS ITS SUBJECT MATTER IS "VENUE" NOT "LIABILITY."

The provisions of the Act material hereto are:

> Sec. 1. "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury * * * resulting in whole or in part from the negligence * * * of such carrier." (45 U. S. C. A. 51.)
>
> Sec. 5. "Any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this chapter, shall be to that extent void." (45 U. S. C. A. 55.)
>
> Sec. 6. "Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." (45 U. S. C. A. 56.)

The liability mentioned in Section 5 is that created by Section 1, for no other part of the Act creates any liability. Section 6 obviously relates to venue and not to liability. In the instant case the liabilities of the parties were measured by Section 1 before the contracts were entered into. They are still measured by Section I. Liability is unchanged; only venue is affected. Venue may be waived in numerous ways, including by contract.

Section 6 of the Employers' Liability Act is obviously a venue statute relating to a particular class of cases, and

must be considered simply as an amendment to the general venue statute, Section 51 of the Judicial Code. The provisions of Section 6 relating to venue could well have been included in the general venue statute, but it was more convenient to couple them with the provisions creating the causes of action to which they apply. That Section 6 is simply an amendment to the general venue statutes designed to deal with cases under the Federal Employers' Liability Act is made clear by the recent decision of the Supreme Court in *Baltimore & Ohio Railroad Company v. Kepner*, 314 U. S. 44. Both the majority opinion by Justice Reed and the dissenting opinion by Justice Frankfurter recognize this. Referring to the legislative history of Section 6, the majority says:

> "No doubt this language was actually considered by the Senate Judiciary Committee, as well as the language of the general venue statute for which the committee was providing an exception." Page 50.
>
> "The privilege was granted because the general venue provisions worked injustices to employees." Page 53.
>
> "When the section was enacted it filled the entire field of venue in federal courts. A privilege of venue granted by the legislative body which enacted this right of action, cannot be frustrated for reasons of convenience or expense." Page 54.

The dissenting opinion of Justice Frankfurter also recognizes Section 6 as simply another venue statute:

> "The phrasing of the section is not unique: it follows the familiar pattern generally employed by Congress in framing provisions (citing illustrations). The decision cannot rest, therefore, upon any peculiarities of the language of the provisions." Page 56.

> "Nothing in the language or the history of the venue provisions of the Act differentiates it from the numerous other venue provisions of the Judicial Code." Page 62.

A multitude of cases hold that the provisions of the general venue act may be waived. It follows that the venue privilege under Section 6 of the Federal Employers' Liability Act may be waived.

The legislative history of Section 6 of the Employers' Liability Act makes it clear, first, that the word "liability" as used in Section 5 refers only to the liability mentioned in Section 1; and second, that Congress had no intention of creating any rule of venue so rigid that it could not be waived.

The original Employers' Liability Act became effective April 22, 1908. It is to be found in *35 Statutes at Large*, pages 65, 66—Chapter 149. Sections 1 through 5, inclusive, were then practically the same as they are today, but Section 6 then provided for a two year statute of limitations—nothing more. There was then no provisions whatever as to jurisdiction or venue. The only liability in the entire Act at that time was that provided in Section 1 and 2. Jurisdiction and venue were then controlled by the general venue statute in the Judicial Code. On November 6, 1909, the Circuit Court of the Western District of Texas, El Paso Division, decided *Cound v. Atchison, Topeka & Santa Fe Ry. Co.*, 173 Fed. 527. That was an action brought under the 1908 Act originally passed, by a resident of Texas for an injury arising in New Mexico. The defendant was a Kansas Corporation. The Court held that the suit could not be maintained in the Federal Court of Texas, although plaintiff resided in that State, because the defendant was a Kansas Corporation, and under the terms of the general venue act suit could be main-

tained only in the state of incorporation. It was this decision which led to an amendment, effective April 5, 1910, which added the second paragraph of Section 6, which relates to venue and to the concurrent jurisdiction of the State and Federal Courts. The purpose of the amendment was to escape the decision in the Cound case and to make it possible for a plaintiff to sue in the state of his residence, thus relieving the plaintiff of the burden of going long distances with his witnesses to maintain his suit.

The debates in Congress are enlightening. They will be found in the Congressional Record, 61st Congress, Second Session, Volume 45, Part 3, Page 2253. The debate in Congress occurred February 23, 1910. The amendment was sponsored by Congressman Sterling. We quote part of the debates:

Mr. Sterling:

> "Mr. Speaker, this proposed amendment makes three changes in the employers' liability law. As the law is now, suit can be brought only in the district where the defendant is an inhabitant. It has been held by one of the Federal Courts in Texas. This amendment proposes to allow the plaintiff to begin suit in the district where the plaintiff lives, or in the district where the injury occurred, or in the district where the defendant may be found at the time action is commenced * * *."

Mr. Clark of Missouri:

> "Does this bill in any way enlarge the jurisdiction of the United States Court, or curtail the jurisdiction of the State Courts?"
>
> Mr. Sterling: "It does not. It makes it much more convenient for the plaintiff to bring his suit by providing that he may sue in his own district, or in the defendant's district, or where the injury oc-

curred, or where the defendant may be found. As the law is now, a suit can be only brought in the district where the defendant is domiciled. * * *"

Mr. Moore of Pennsylvania:

"Suppose a case where an accident occurred from 100 to 500 miles away from the home of the plaintiff, and all the witnesses resided there. It would be a great hardship upon the plaintiff not to allow him the right to bring the action where the accident occurred and where the witnesses were present."

Mr. Burke of Pennsylvania:

"And that throws light upon the very business that the gentleman has been familiar with, of bringing actions, and would impose as much hardship by bringing actions in remote places under such a change of law, and thus compel the defendant to take his witnesses a very great distance at his very great disadvantage."

Mr. Sterling:

"The plaintiff is likely to bring suit where it is most convenient to him; that is, where the witnesses reside or in the place of injury. That would also be most convenient to the defendant. An injured employee ought not to be required to carry his witnesses a long distance."

The foregoing quotations from the Congressional debate demonstrate that the purpose of 1910 amendment was to eliminate a quirk in the law whereby the plaintiff had theretofore been compelled to take his witnesses for long distances in order to find a Court that would entertain jurisdiction. The purpose was to promote convenience, not create inconvenience. The purpose of the contracts herein involved was to promote convenience and to obviate inconvenience.

Boyd in his Brief relies upon *Duncan v. Thompson*, 315 U. S. 1, which involved a contract in which the employee agreed to return money as a condition precedent to filing suit. Obviously, the purpose of the contract was to exempt the carrier from liability since it was very likely that the employee would be unable to raise and return the money paid to him by the carrier.

The Duncan case was carefully differentiated in *Clark v. Lowden, et al.*, 48 F. Supp. 261 at page 265.

> "* * * It seems clear that in the Duncan case Justice Black while holding that Section 5 pertains to contracts after an injury as well as before, and reversed the holdings of certain State Courts in that regard nevertheless in no way indicated that as used in the Statute, 'liability'—the responsibility of the carrier to respond in damages—embraces 'venue'."

Boyd in his brief relies principally upon *Sherman v. Pere Marquette*, 62 F. Supp. 590, which doctrine is followed in *Fleming v. Husted*, 68 F. Supp. 900; *Peterson v. Ogden Union*, 177 Pacific 744.

In the Sherman case the Court states that an injured employee's right to bring an action in the district in which the carrier shall be doing business, and the carriers' responding duty or liability of submitting to suit in such district, are an adjective right and adjective duty or liability under the Act. If, as the Court said, Sherman could not have made a valid agreement as to venue—an adjective right—in the face of Section 5 of the act, then by the same token he could not have entered into a stipulation with the Pere Marquette for the granting of an extension of time to plead or for any other procedural (adjective) matter.

By that reasoning, an injured employee could never execute a valid release upon an amicable settlement being reached. A release surely exempts the carrier from liability and yet by no stretch of the imagination could Section 5 of the Act be applied to such a final release any more than it could be applied as to a contract concerning venue.

In the Sherman decision, the Court ten times used the phrases "duty" or "liability", thus indicating that the words "duty" or "liability" are synonymous. Congress did not confuse the two expressions, or use them interchangeably, in the Act.

Webster's definition of "liability" is as follows:

> "State or quality of being liable; as the liability of an insurer. That which one is under obligation to pay, or for which one is liable. Specif., in the plural, one's pecuniary obligations, or debts, collectively; — opposed to assets."

His definition of "duty" is as follows:

> "2. That which is required by one's station or occupation; * * * 3. That which a person is bound by moral obligations to do or refrain from doing; that which one ought to do. 4. That which one is bound to render or pay; a material due of any sort; a charge of payment due. 5. Any payment service or other render imposed and recoverable by law or custom; * * *."

Surely, the two words are not interchangeable, and they cannot be used synonymously.

It is significant that Petitioner has not produced one single decision of this Court which holds that after a cause of action has come into being the parties may not waive their statutory venue privileges.

The rule is stated in *17 C. J. S., Contracts*, Sec. 229, pg. 605, as follows:

> "As a general rule venue is not a subject of contract, and except by reason of statute, a stipulation in a contract fixing the venue of an action on the contract as to future litigation is generally held void as contrary to public policy * * *. However, *this rule does not apply to agreements as to accrued causes of action, such agreements being valid and enforceable*, in the absence of misrepresentation, fraud, or mutual mistake. Where no question of public policy is involved, such a contract provision, is, of course, sustained." (Emphasis supplied.)

A-2. VENUE MAY BE WAIVED UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

In the recent case of *Hoiness v. United States*, 69 S. Ct. 70, this Court had under consideration the provisions of Section 2 of the Suits in Admiralty Act, 46 U. S. C. A., 3741 *et seq.* 41 Stat. 525, which provides that "* * * such suits *shall* be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found" (emphasis ours). The suit was brought in a district other than where the Petitioner resided or where the vessel was at the time suit was filed, and the United States answered to the merits, leaving all questions of jurisdiction to the court. This Court held that notwithstanding the apparent mandatory provision of the statute designating the districts in which such a suit "shall" be filed, it related only to venue which could be and was waived. The decision of this Court was unanimous, and we quote from the opinion as follows:

"The ruling of the District Court that the provisions of Section 2 of the Suits in Admiralty Act, directing where suits shall be brought, were jurisdictional, was in our view erroneous. Those provisions properly construed relate to venue.

The section relates not to libels *in rem* but to libels *in personam*. A similar provision in ¶6 of Tucker Act, 24 Stat. 506, 28 U. S. C. (1946 Ed.) ¶762, 28 U. S. C. ¶1402, 28 U. S. C. A. ¶1402, was held to prescribe venue and hence could be and was waived by failure to object before pleading to the merits. *United States v. Hvoslef*, 237 U. S. 1, 14, 12, 35 S. Ct. 459, 462, 59 L. Ed. 813, Ann. Cas. 1916A, 286; *Thames & Mersey Marine Ins. Co. v. United States*, 237 U. S. 19, 24, 35 S. Ct. 496, 497, 59 L. Ed. 821, Ann. Cas. 1915D, 1087. An analogous provision in the Jones Act, 41 Stat. 1007, 46 U. S. C. ¶688, 46 U. S. C. A. ¶688, was construed the same way. *Panama R. Co. v. Johnson*, 264 U. S. 375, 384, 385, 44 S. Ct. 391, 392, 393, 68 L. Ed. 748. And we recently indicated that that was the correct construction of comparable provisions of ¶2 of the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. ¶782, 46 U. S. C. A. ¶782 (*Canadian Aviator, Ltd. v. United States*, 324 U. S. 215, 224, 65 S. Ct. 639, 644, 89 L. Ed. 901), an act which is similar in purpose and design to the present one. See *American Stevedores v. Porello*, 330 U. S. 446, 452, 67 S. Ct. 847, 850, 851, 91 L. Ed. 1011.

Congress describing the district where the suit was to be brought, was not investing the federal courts 'with a general jurisdiction expressed in terms applicable alike to all of them'. See *Panama R. Co. v. Johnson, supra*, 264 U. S. page 384, 44 S. Ct. 393, 68 L. Ed. 748. It was dealing with the convenience of the parties in suing or being sued at the designated places. The purpose of the Act was to grant seaman relief against the United States in its own courts. The concepts of residence and princi-

> pal place of business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land and unlike private parties is not centered at one particular place. The residence of principal place of business of the libelant and the place where the vessel or cargo is found may be the best measure of the convenience of the parties. But if the United States is willing to defend in a different place, we find nothing in the act to prevent it."

The language of the venue section of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 56, Sec. 6, 36 Stat. 291) is not mandatory in its wording—it says that such suits "*may* be brought", etc. (emphasis ours) whereas the wording of Section 2 of the Suits in Admiralty Act involved in the Hoiness case was that "such suits *shall* be brought", etc. (emphasis ours). Certainly, the language was much stronger in the Hoiness case than in the instant case.

Venue may be waived by any party including the Government:

> "Venue relates to the convenience of litigants, and therefore may be waived by them. * * * The right to have a case heard in the court of proper venue may be lost unless seasonably asserted. * * * The right to have a case heard in the court of proper venue may be waived by any party, including the government." *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (syllabi L. Ed.), 324 U. S. 635, 636 (65 Sup. Ct. 821, 89 L. Ed. 1241, 1242).

The case of *Neirbo Co., et al. v. Bethlehem*, 308 U. S. 165, was cited in the Herrington opinion. There the Supreme Court said (p. 168), "* * * the locality of a lawsuit—the place where the judicial authority may be exercised—though defined by legislation relates to the con-

venience of litigants and as such is subject to their disposition." Although the Federal Employers' Liability Act was not involved in this Supreme Court decision, the language is surely applicable.

Note 161, 29 U. S. C. A., Sec. 112, contains approximately six and one-half columns of citations to cases holding venue may be waived. The attention of the court is invited to the following Federal decisions:

> "Jurisdiction is the power to adjudicate and is granted by Congress. Litigants may not confer this power on the court by waiver or consent, but the place where the power to adjudicate is to be exercised is venue, not jurisdiction. The venue has relation to the convenience of the litigants and may be waived or laid by consent of the parties." *Iselin v. LaCoste* (5 C. C. A., 1945), 147 F. 2d. 791-795.

> "Venue is quite different from jurisdiction. Venue may be waived, but jurisdiction is vital." *In re Miller's Dresses, Inc.* (Tex., 1932), 1 F. Supp. 378.

> "The rule is well settled that such provisions governing the venue of actions confer a personal privilege upon the defendant which may be waived." *Duval v. Bathrick* (Minn. 1940), 31 F. Supp. 510, 511.

In *Kehaya v. Axton* (N. Y., 1940), 32 F. Supp. 273, 275, venue was held to be waived by the filing of an attachment bond in a State Court.

The alleged right of a Delaware Corporation to dismissal of an action against it was waived by failure to assert the right until a year after the litigation began. *Texas Co. v. Marlin*, (5 C. C. A., 1940) 109 F. 2d. 305.

> "Venue of course may be waived." *Weatherford v. Radcliffe* (S. C., 1945), 63 F. Supp. 107, 109.

The right to be sued only in a certain place is a privilege which may be waived by failure to assert it seasonably. *Canright v. General Finance Corp.* (E. D., 111, 1940) 35 F. Supp. 841, relying on *Neirbo v. Bethlehem Ship-Building Corp.*, 308 U. S. 165. In the Neirbo case, Mr. Justice Frankfurter, who wrote the majority opinion, relied on *Commercial Ins. Co. v. Stone Co.*, 278 U. S. 177, 179, where it was held that venue is a personal privilege which one may assert or waive, at his election, and further held:

> "Being a privilege, it may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct."

The case of the *United States v. DeParcq, et al.*, 164 Fed. 2, 124, was decided by the Circuit Court of Appeals for the Seventh Circuit, and involved a contempt action growing out of *Roland v. Atchison, T. & S. F. Ry. Co.*, *supra*. In that case contracts analogous to those herein involved, and Sections 55-56 were also in issue. The Circuit Court of Appeals held that (page 126):

> "A court may have jurisdiction but no venue, but since venue is a privilege that may be waived when not asserted, the jurisdiction is not ousted; but when the court's venue is challenged and the challenge sustained, and dismissal of complaint follows, as in the instant case, jurisdiction is thereby terminated."

B.

VENUE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT IS A PRIVILEGE, NOT A VESTED RIGHT

The amendment to the Judicial Code, 28 U. S. C. 1404 A. provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought."

The question of whether or not this amendment applied to the Federal Employers' Liability Act was passed upon by this Court in the case of *Ex Parte Collett*, 69 S. Ct., 944, and on the same day held the same way in the case of *Kilpatrick v. T. N. R. Co.*, 69 S. Ct. 953.

As was stated by Mr. Justice Vinson in the Collett case, *supra*.

> "Section 6 of the Liability Act defines the proper forum; Section 1404(a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404(a) does not limit or otherwise modify any right granted in Section 6 of the Liability Act or elsewhere to bring suit in any particular district. An action may still be brought in any Court, State or Federal, in which it might have been brought previously."

Obviously, if the venue provisions of Section 6 of the Liability Act create a "liability" which may not be waived by an injured employee, this Court would not have held that Section 1404 (a) of the Judicial Code applies to Liability Act cases, as it did in the Collett and Kilpatrick cases. We think that those cases were correctly decided and, by a parity of reasoning, the venue

provisions of Section 6 do not create a liability, but only privileges for the injured employees' convenience which may waive by contract.

In view of the above decision, giving lower courts the right to transfer causes of action from one district to another, it must necessarily follow that venue is a privilege which can be exercised not only by the parties litigant, but the court, and is not a vested right which cannot be waived, or a liability under the meaning of Section 4 of the Federal Employers' Liability Act.

C.

THE CONTRACTS ENTERED INTO WERE NOT VOID UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT

Boyd's cause of action arose on the day that his injuries were sustained. He could have elected to bring his suit in Michigan where both parties resided and where the accident occurred, or in Illinois, or in any other State in which the Grand Trunk was doing business. On the other hand, he could have waited to choose his court until the Statute of Limitations was about to outlaw his right of action. Certainly, he could have made that choice as he actually did several weeks after he was injured.

We cannot tell, of course, what was in Boyd's mind at the time he agreed to confine his action to the Michigan Courts. But we can assume that he felt satisfied with a forum in his home State of Michigan, and to avoid the trouble and expense of bringing himself and his witnesses on over crowded trains and tolerating the impossible hotel situation in Chicago. Notwithstanding that for a valuable consideration plaintiff covenanted to sue only in Michigan and for reasons best known to himself and his coun-

sel, Boyd attempted to rescind his contract, changing his mind about Michigan venue and brought suit in Chicago.

Agreements such as the one signed in this case have been commonly entered into between Railroad Companies and their employees. The benefits of the agreement are mutual. The parties agree to make an honest attempt to settle the claim amicably, and thus avoid unnecessary litigation. The employee receives an advancement. The Railroad Company receives the assurance that it will not be harassed with annoying and vexatious litigation being brought against it at a point far removed from the place of the accident. In view of the distance from the scene of the accident, the residence of the parties, and the residence of the witnesses, and considering manpower shortages, lack of train and hotel accommodations, it becomes extremely burdensome and expensive for the Respondent to have to defend a lawsuit so far from the place of occurrence. The present shortage of doctors, nurses, hospital technicians, etc. also make it virtually impossible for these professional men and women to leave their home communities and their patients to come to points such as Chicago to testify. Hence, the railroads have encouraged agreements such as the instant one, and such agreements are in general use by practically all our railroads throughout the country.

It should be remembered that the agreement in no way impairs the right of Boyd to seek legal redress against the Grand Trunk. All the Federal Courts and State Courts located within the County or District where the injuries were sustained and where he resided, are available to him for filing of a suit. There is no suggestion that the Courts in the County or District in which the accident occurred or in which appellant resided would not accord him the full protection of the law to the same

extent as the Courts in Chicago or any other part of the Country; and if not, this Court has the power to see that they do. The "liability" of the railroad company is exactly the same regardless of the forum in which the case is tried. The agreement does not violate the Federal Employers' Liability Act, nor is it against public policy. It is merely a reasonable restriction as to the venue in which the suit may be commenced.

Various courts have had occasion to pass upon the validity of this type of agreement. The precise question was before the Supreme Court of Minnesota in 1936, in the case of *Detwiler v. Lowden, et al.*, 269 N. W. 367. In that case, a fireman, employed by the defendant railroad, was injured in a collision in the State of Kansas, in which state he also resided. The plaintiff was advanced a sum of money by the defendant, in consideration of which he agreed to attempt in good faith amicably to settle with the defendant for his injuries; and if his claim could not be so adjusted, he covenanted with defendant not to sue it for damages on account of said injuries in any courts sitting outside the state of his residence or outside of the state wherein said injuries occurred.

Notwithstanding such covenant, the plaintiff subsequently brought said suit against the defendant in the State of Minnesota. The Supreme Court of Minnesota upheld the agreement, saying (pp. 369-370):

> "The covenant cannot be held to contravene either section 55 or 56 of title 45 U. S. C. A. (Federal Employers' Liability Act, Sects. 5, 6). It is clear the covenant does not infringe section 55, reading: 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter shall to that extent be void.' The covenant does not attempt to

settle the cause of action, nor does it exempt defendants from any liability created by the Act. It is said plaintiff's cause of action is transitory and by section 6 of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 56) he had the privilege of bringing it in any state court, since state courts have concurrent jurisdiction with the federal courts, and in the latter such action may be brought 'in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencement of such action.' There is also a provision that no action under the act brought in a competent state court shall be removed to a federal court. The Restatement of the Law of Contracts, sec. 558 is: 'A bargain to forego a privilege, that otherwise would exist to litigate in a Federal Court rather than in a State Court, or in a State Court rather than in a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action or the time within which a possible future claim may be asserted is illegal.' It is to be noted that the illegality is as to provisions regarding future causes of action and unreasonable limitations in respect to the tribunal where the causes of action may be litigated, neither of which is present here. The contract concerns an existing cause of action, and certainly the covenant to sue only in the courts sitting in the state where the cause of action arose and where plaintiff then resided is reasonable. We regard the covenant legal on its face, and it should be enforced, if plaintiff knowingly without fraud on the part of defendant signed and delivered the contract containing the covenant.

"The appeal is dismissed." (Italics supplied.)

As was said by Judge Holt in the Detwiler case, just cited, at p. 369, "after plaintiff's cause of action had

accrued, he was free to enter any stipulation he chose with regard to it." His claim could have been settled, and he could have given a release. A release surely "exempts from liability", and yet by no stretch of imagination would Section 5 of the Federal Employers' Liability Act be applied to it. Section 5, we contend, refers to future liabilities, and not accrued causes of action.

Thereafter, the District Court of the United States for the District of Minnesota, First Division, in the case of *Detwiler v. Chicago, R. I. & P. Ry. Co.*, 15 F. Supp. 541, upheld the same agreements and said (p. 543):

> "Plaintiff's motion to strike that portion of the answer of the defendant trustees setting up the so-called contract as a defense upon the grounds that it appears to be void on its face, and the further motion that if said motion be denied that the defendant trustees amend their answer in a certain particular as set out therein, be and the whole thereof is denied."

In 1942, a similar agreement was sustained in the case of *Clark v. Lowden, et al.*, 48 F. Supp. 261, by the District Court of the United States for the District of Minnesota, Second Division. There the injury to the employee-plaintiff occurred in Illinois. The plaintiff subsequently entered into an agreement with the railway, by which, in consideration of an advancement in the sum of $150., he agreed that if litigation became necessary, he would limit the venue to either the state of his residence or the state where the accident occurred. The plaintiff brought suit in Minnesota. The court held the agreement to be a reasonable and valid one, saying (pp. 265-6):

> "* * * if plaintiff and defendants voluntarily agree upon the courts in a certain forum, in the event litigation results, no exemption or derogation

of defendant's liability ensues. It is not pointed out or even urged that defendant's liability for damages for negligence is impaired or in any way diminished in the Illinois forum.

* * *

"Lastly, it may be stated that such contract under all the circumstances is reasonable and in no way infringes upon the right of the employee to obtain complete restitution for damages sustained. Certainly, it cannot be held contrary to public policy during these war times when the carriers are burdened with heavy transportation problems. The time spent by railroad employees traveling long distances to attend trials may increase that burden and in some degree, at least, it may enhance the transportation load which the railroads are obliged to assume. During the last war, the Director General of Railroads promulgated General Order No. 18A on April 18, 1918, which reads:

"General Order No. 18 A, April 18, 1918.

"General Order No. 18, issued April 9, 1918, is hereby amended to read as follows: 'It is therefore ordered that all suits against carriers while under Federal Control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose.'

"This was sustained as a reasonable limitation upon venue in *Alabama & Vicksburg R. Co. v. Journey*, 257 U. S. 111, 42 S. Ct. 6, 66 L. Ed. 154. Not that the existence of transportation problems by reason of the war is determinative of the issues here presented, but it is a factor which admittedly bears upon the reasonableness of the agreement. The curtailment of civilian travel on railroads and the excessive demands made upon the Nation's transportation facilities strongly support defendants' position that, under these circumstances, the covenant

with respect to venue is entirely consonant with public policy.

"It follows, therefore, that the covenant regarding venue should be and is found to be legal and enforcible on its face, and that plaintiff's motion to dismiss the portion of defendant's answer referred to in the notice of motion must be, and the same hereby, is denied. It is further ordered that the issues arising out of Paragraph V of the answer herein and the reply interposed by plaintiff be determined in advance of the other issues in the case."

This type of agreement has been upheld by the District Court for the Western District of Missouri, Western Division, in the case of *Herrington v. Thompson*, 61 F. Supp. 903. There, the plaintiff was injured in Kansas. Subsequently, in consideration of a money advancement, an agreement was entered into in which he covenanted to bring suit only in the State of Kansas. The plaintiff brought his suit in the State of Missouri, a state contiguous to Kansas. The court held that the defendant's motion to dismiss should be sustained, saying (p. 904):

"* * * it may be conceded that by Section 56, 45 U. S. C. A., the plaintiff was accorded the right to bring suit here as well as in the State of Kansas. The point under consideration is whether he contracted away such right.

"Distinction is made by the authorities between executory contracts with respect to venue and those agreements made after the cause of action has accrued. *17 C. J. S.*, Contract, Section 229, p. 605, states the law succinctly as follows: 'As a general rule venue is not a subject of contract, and except by reason of statute, a stipulation in a contract fixing the venue of an action on the contract as to future litigation is generally held void as contrary to public policy, * * *. *However, this rule does not*

apply to agreements as to accrued causes of action, such agreements being valid and enforceable, in the absence of misrepresentation, fraud, or mutual mistake. Where no question of public policy is involved, such a contract provision is, of course, sustained.'

"Turning to the question of public policy, it appears from the authorities that public policy would be inclined to favor the agreement. The Supreme Court, in *Michigan Central v. Mix, et al.*, 278 U. S. 492, 49 S. Ct. 207, 73 L. Ed. 470, declined to permit the maintenance of an action against the Michigan Central where the cause of action accrued in the State of Michigan, but had been brought in the State of Missouri. It is true that there was a question of due process in the case but the court said in discussing a similar ruling in another case: (278 U. S. Loc. cit. 496, 49 S. Ct. 209), 'It was assumed that the carrier had been found within the state. The judgment was reversed on the ground that to compel it to try the cause there would burden interstate commerce, and, thence, would violate the commerce clause.'

"In this case the plaintiff loses no right. It is his privilege to proceed either in the federal or a state court sitting in the State of Kansas to enforce the identical claim asserted here and in a jurisdiction where he had agreed, for a valuable consideration, that he would seek to enforce such claim. Unquestionably, the witnesses reside at Coffeyville, or environs, and while it is not far from Kansas City, yet the convenience of the parties, including the plaintiff himself, would be best served by enforcing his rights in those jurisdictions. As indicated, venue is a personal privilege, and for a good reason, and in accordance with public policy, the plaintiff waived or contracted to waive his privilege to bring his suit here. It was his contract. It does not run counter to the public policy, but, on the contrary, accords with public policy. It is the duty of the

court to enforce the contract made between the parties. That contract was that the venue of the litigation should not be exercised or enjoyed in this jurisdiction.

"In *Harbis v. The Cudahy Packing Co.*, 211 Mo. App. 188, 241 S. W. 960, 962, the court said in reference to venue: 'It is well settled that parties may so contract if they choose.' The Supreme Court did not quash the opinion. *State ex rel. Harbis v. Trimble*, 292 Mo. 333, 238 S. W. 809.

"In *Lidgerwood v. Hale & Kilburn Corporation*, D. C., 47 F. 2d. 318, Loc. cit. 320, the court said 'Until the time arrives when courts are to re-make for parties the contracts which they have made, it seems to me that nothing can be done for plaintiffs in a situation like this.'

"In view of the foregoing, the motion to dismiss should be sustained, and it will be so ordered."

The Honorable Judge Sullivan likewise has sustained this kind of agreement. *Roland v. Atchison, T. & S. F. Ry. Co.*, 65 F. Supp. 630, in the following language (loc. cit., 631):

"The question before me is whether that agreement is a valid agreement. I am convinced that plaintiff voluntarily entered into this agreement and that is binding upon him. In my opinion it does not violate the Federal Employers' Liability Act, nor is it against public policy. Plaintiff's rights have been in no way impaired, and the contract does not impose any unusual or unreasonable restrictions. Plaintiff is not limited to any one court within the State of New Mexico, but he may bring his action in any court in that State which has jurisdiction.

"The motion to dismiss will be sustained, and the complaint dismissed, without prejudice, and with

> the privilege of bringing the action in any court in New Mexico, in which the plaintiff elects to proceed."

It must be remembered that the parties in the instant action did not exempt the Grand Trunk "from liability to suit for the violation of the act". For the sake of reasonable and mutual convenience they voluntarily stipulated and agreed that the question of liability should be litigated as litigation becomes necessary in Federal or State Courts, sitting in Michigan, any one of which would afford both parties a just trial in a forum convenient to both. "Plaintiff's rights have been in no way impaired, and the contract does not impose any unusual or unreasonable restriction." *Roland v. Atchison, T. & S. F. Ry. Co., supra.* He did waive the venue of some courts, but that, being a personal privilege, he had a right to do.

On January 12, 1948, the Supreme Court of the United States handed down an opinion in the case of *Rudy E. Callen v. The Pennsylvania Ry Co.* In that case in consideration of the sum of $250.00, the plaintiff executed a general release of "all claims and demands, which I have, or can, or may have against said Pennsylvania Ry. Co., for or by reason of personal injuries sustained by me." The Court said:

> "The plaintiff has also contended that this release violated Section 5 of the Federal Employers' Liability Act, which provides that any contract to enable any common carrier to 'exempt itself from any liability created by this chapter shall to that extent be void.' Stat. 36, 66, 45 U. S. C. A. 55. It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so, for how much, Congress

has not said that parties may not settle their claims without litigation."

In our opinion, this case is decisive of the proposition that a Railroad Company may lawfully enter into an agreement with an injured employee, which is of mutual benefit to each, is in furtherance of sound public policy, providing that the liability, if any, of the Company under the Federal Employers' Liability Act shall be determined in a Court in the county or district where the accident occurred or in which the plaintiff resided. This is a natural place for such an action to be brought, without such contract being in any respect a device to exempt the Railroad Company from liability. The liability of the Railroad Company to respond in damages for a claimed injury continues to exist regardless of where suit is brought and all such a contract does is to limit the forum to one that is convenient for all parties and their witnesses.

D.

Petitioner contends that the Michigan Supreme Court was in error in not following the decision of the United States Court of Appeals, Sixth Circuit, in the case of *Akerly v. New York Central Railroad Company*, 168 F. (2nd) 812, which decision was handed down approximately two weeks before the Michigan Supreme Court decided the instant case.

The weight of authority is to the effect that the Michigan Court was not bound by the decisions of the United States District Court or Circuit Courts of Appeal. The leading case on this point is *Home Insurance Company of New York v. Northern Pacific Railway Company*, 147 A. L. R., 849, at page 855, a Washington Supreme Court decision.

"When a federal statute is construed by a United States Court of Appeals, such construction is entitled to great weight with us when the same statute is involved in a case we are considering, *but it is not binding on us if we do not deem it logical or sound.* There are some cases and texts which state broadly that the decisions of 'federal courts' construing federal statutes are binding on the state courts, but an examination of them will disclose that what is referred to is the United States Supreme Court, not the federal courts generally. We have found no case in which the question has been squarely presented holding that decisions of the inferior federal courts on any federal question are binding on the state courts, or anything more than persuasive and entitled to great weight." (Italics supplied.)

The Federal Statute (Sec. 56) gives State Courts and Federal Courts concurrent jurisdiction. We contend that while the decisions of the United States Supreme Court are binding on the Michigan State Supreme Court, the decisions of the lower federal courts are not, and the Michigan Court could exercise its own discretion and judgment in the matter at issue.

It is interesting to note in this respect that in the home Federal District Court of the attorneys for Appellant, which is the Northern District of Illinois, Eastern Division, said court decided the identical question on two different occasions within six months, each time arriving at a different conclusion. On October 3, 1945, *Sherman v. Pere Marquette, supra,* was decided and it was held that contracts of this character are void. On April 17, 1946, *Roland v. Santa Fe Railroad, supra,* was decided and it was then held that contracts of this character are valid. The query naturally presents itself whether or not *Roland v. Santa Fe* overruled *Sherman v. Pere Marquette,* or whether the Judge deciding the Roland case

refused to be bound by the previous decision. Certainly, if the Judges of a Federal District Court cannot agree and are not bound by their own decisions, a State Court must necessarily exercise its own discretion, which the Michigan Court did in this instance.

E.

The filing of the suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, was in accordance with applicant's contractual obligations (R. 19, 20, 21), and the Orders of the Supreme Court of Michigan (R. 9, 97), and is tantamount to an abandonment by Appellant of his suit in Illinois. The Federal Court case in Michigan can proceed to trial and final determination of every issue in it (which includes every issue in the Illinois case) regardless of whether a Writ of Certiorari was issued in this proceeding or of the ultimate determination of the issue presented by Appellant.

It is respectfully submitted that this renders the case moot.

C. M. Patten & Co. v. United States, 289 U. S. 705, 53 S. Ct. 687;
Hargis v. Bradford, 283 U. S. 781, 51 S. Ct. 342.

This Court will not issue a Writ of Certiorari or otherwise proceed to an adjudication where there is no subject matter on which the judgment of the Court can operate.

Montgomery Ward & Co. v. U. S., 326 U. S. 690;
Ex Parte Baez, 177 U. S. 378, 390;
Brownlow v. Schwartz, 261 U. S. 216, 217;
Chandler v. Wise, 307 U. S. 474, 477-478;

Director of Prisons v. Court of First Instance of the Province of Cavite, 239 U. S. 633;
Jones v. Montague, 194 U. S. 147;
Mills v. Green, 159 U. S. 651, 653.

This is so notwithstanding the contention that a determination of the issue is necessary because of contemplated future cases.

Commercial Cable Co. v. Burleson, 250 U. S. 360.

The Court is without power to decide moot questions or give advisory opinions.

St. Pierre v. United States, 319 U. S. 41.

And the Court should not pronounce judgment on abstract questions even if its opinions might influence future actions under like circumstances.

Richardson v. McChesney, 218 U. S. 487, 492.

A similar principle was involved in the recent case of *Brotherhood of Locomotive Engineers, et al. v. United States*, 69 S. Ct. 137, and this Court denied Certiorari upon Respondent's objection that settlement between the parties of the question at issue rendered the case moot.

It is no answer for Appellant to say that he may commence as many actions as he may wish in different permitted jurisdictions. The least that can be said is that the filing of the case in Michigan demonstrates that Appellant is willing to have his case tried in Michigan if it is reached for trial first and that being true the suggestion leads to the inevitable conclusion that there is no substance to it.

CONCLUSION

Respondent respectfully urges that the relief asked for by Appellant be denied, and that the decision of the Supreme Court of Michigan and its Judgment be affirmed and approved.

Respectfully submitted,

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